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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936,

No. 436.

IN THE MATTER

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*;

Petitioners,

against,

IRVING TRUST COMPANY, as Trustee of UNITED CIGAR STORES COMPANY OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION ON BEHALF OF TRUSTEE

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Opinions Below

The opinion of the Special Master (Irwin Kurtz, Referee in Bankruptcy) appears on page 739 of the record and is not reported. The District Court (Judge Coxe) rendered no opinion. The opinion of the Circuit Court of Appeals is reported in 83 F. (2d) 202, the dissenting opinion of Judge A. N. Hand appearing at page 206. The opinion of the Circuit Court of Appeals on its denial of a rehearing is reported in 85 F. (2d) 11.

PRELIMINARY JURISDICTIONAL POINTS.

1. There are no petitioners other than the Joseph E. Otis Estate Land Trust.

The petition purports to be on behalf of 94 different petitioners, each of them a different claimant in a bankruptcy proceeding. However, the petition only names one claimant, the Otis Trust, the precise language being:

> "Your petitioners, the Joseph E. Otis Estate Land Trust, together with 93 other petitioners, pray that a writ of certiorari issue," etc.,

and the petition being signed only on behalf of the

> "Joseph E. Otis Estate Land Trust, *et al.*"

In other words, it is evidently the theory of the petition that the Court must search the record to determine precisely who are the petitioners. It is respectfully submitted that this is error, and that by definition a "petition" can only be entertained on behalf of those parties who caused themselves to be named in it, or who at least signed it. On this view, only the petition of the Otis Land Trust could be entertained.

2. In any event, the petition was filed after three months had expired from the date of the final judgment in respect of 85 out of the 94 claims.

The opinion of the Circuit Court of Appeals in respect of all 94 claims was filed April 6 (R. 780). A judgment was duly entered thereon on April 13 affirming the decree of the District Court and ordering that a mandate issue (R. 790-791). The petition for a writ of certiorari was

filed October 5, clearly outside the statutory three months' period.

On April 21, 1936, however, there was filed in the Circuit Court of Appeals a petition variously entitled as follows:

> "Petition of *Certain* Appellants for Rehearing" (R. 791); and
>
> "Petition for Rehearing With Respect to *Certain* Claims Herein" (R. 793);

and opening as follows:

> "To the Honorable Judges of the Circuit Court of Appeals for the Second Circuit:
>
> This petition for rehearing is made with respect to the *nine claims* involving qualified agreements of assignment and release[1] * * *
>
> [1]Nos. 5235 Excell Trustees, 5277 Wm. E. and Warren H. Munk, 5286 Simon Lorch, 5302 Louise S. Whitcomb and Florence Welch, 5304 Abe and Myrtle Schwartz, 5312 Isidor A. and Flora L. Rubel, 5341 Thos. H. Brown et al., 5406 Herbert and Sigmund Livingston, as Trustees, and 5421 J. E. Nunn." (R. 793)

Indeed, there can be no dispute but that the entire purport of the petition for rehearing was that it was filed on and in respect of 9 claims only (R. 791-803). On July 6, the Circuit Court of Appeals filed its opinion and entered its judgment denying the petition for rehearing of the 9 claimants (R. 803-806).

The petition for writ of certiorari having been filed on October 5, it is timely as to those 9 claimants, subject to the point already made that none of said 9 claimants are named

in the body of the petition for writ of certiorari[1] or signed the same.

3. Summary.

It appears to be beyond possible dispute that there are properly before this Court at most only the 9 claimants in respect of which the petition for writ of certiorari was filed within three months after the denial of the petition for rehearing, and that on no ground can the petition be treated as having been timely filed here as to the other 85 claimants.

The only petitioner directly named in the petition or which signed the petition was one of the 85. If that name, the Joseph E. Otis Estate Land Trust, be eliminated, the petition is in substance simply presented as a petition on behalf of certain unnamed petitioners, for the names of which the Court must either search the record or draw an inference from a foot-note in the petition.

Without waiving any of the foregoing points we will, in the balance of this brief, treat all 94 claims *as if* a petition in respect thereto had been properly and timely filed.

DISCUSSION ON THE MERITS

Types of Claims Presented

The claims here fall into two broad classifications, (1) 85 of them being claims of landlords who executed unqualified releases to the Debtor prior to the filing of the

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[1]The 9 claimants are named in an explanatory footnote at page 2 of the petition for writ of certiorari; and an incidental question may be thereby presented as to whether this Court will search the petition for an inference from a foot-note that parties named therein are intended to be petitioners.

petition under Section 77B of the Bankruptcy Act, and (2) 9 being claims of landlords whose releases were qualified by a rider negativing the waiver by the landlord

> "of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled * * *" (R. 784).

The Circuit Court of Appeals was unanimous in rejecting claims of the first type, but Judge A. N. Hand dissented as to claims of the second type. As to claims of the first type, the court below recognized that clearly there was no obligation remaining on the part of the Debtor to the landlord after the execution of the release; as to claims of the second type, on the other hand, a question was presented as to (i) whether the rider had the effect of reserving the right to prove claims merely against the estate as then administered in normal (pre-§77B) bankruptcy proceedings, as was contended for by us and was the view adopted by the majority of the Circuit Court of Appeals, or (ii) whether the rider also had the effect of reserving the right to prove claims against the Debtor itself, and consequently to prove them in subsequent 77B proceedings, as was contended for by the claimants and was the view adopted by Judge A. N. Hand. The claim of Mrs. John S. Meadows, in respect of which this Court granted petition for writ of certiorari on Monday, October 26, October Term 1936, No. 151, was a claim of the second type.

Statute Involved

The provisions of Section 77B of the Bankruptcy Act dealing with landlords' claims are set forth in the Appendix to this brief.

The Facts in Greater Detail

The petitioners comprise 94 former landlords[2] of the Debtor who in the latter part of 1932 and early in 1933, during the prior bankruptcy proceedings of the Debtor, entered into contractual arrangements with the Debtor and its trustee in bankruptcy resulting in the termination of all further liability on the part of the Debtor under their leases. All of the leases involved had been found burdensome by the bankruptcy trustee; and the bankruptcy trustee had thereupon been authorized by the court to disaffirm unless the landlords were willing to agree to modifications or, in cases where the trustee had determined not to continue, to accept surrenders by taking assignments of the leases and the subleases.

Thereupon, all of the 94 claimants here executed agreements with the bankruptcy trustee. In 42 of those agreements the claimants agreed to modifications of their leases and accepted new tenants, thereby effecting novation (R. 785), and in 50 other instances there were agreements for surrender or termination of the leases (R. 786). Each of those 92 agreements also contained a release of all claims against the Debtor. The remaining 2 agreements contained simply a release, for a cash consideration[3] (R. 786).

About eighteen months after these arrangements were completed, Section 77B was enacted, and proceedings were

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[2]These 94 claimants were grouped in one proceeding, because all are represented by one attorney (Solomon E. Harrison, of Chicago) who, with his associates, was responsible for the solicitation and filing of, and has a substantial contingent interest in, their claims (R. 524, 562, 570, 697).

[3]The findings of the court below to which reference is here made, were based on a voluminous and detailed record and are not challenged in the petition.

begun thereunder by the Debtor. The petitioners herein then filed claims "for injury resulting from the rejection" of their leases or "for damages or indemnity" under covenants in such leases (R. 8). All of the claims were ordered expunged by the District Court (R. 752), acting on the recommendation of the Special Master (R. 739). The Circuit Court of Appeals affirmed on the ground[4] (R. 787)

> "* * * that, as none of the claims arose from the rejection of leases and all the original leases upon which they are based were terminated by agreement of the parties before these proceedings were instituted and, indeed, before section 77B was passed, and the leased real estate surrendered to and accepted by the landlords without any reservation of rights under the leases against the lessee, this debtor, the lessors have no valid claims for future rent."

ARGUMENT

I.

BY RELEASING THE DEBTOR FROM ALL LIABILITY, THE PETITIONERS RELINQUISHED THE RIGHT TO CLAIM UNDER SECTION 77B.

The decision below turned upon the effect to be given to certain agreements entered into between the petitioners and the Debtor before Section 77B became law. Under the interpretation put upon these agreements by the Circuit Court of Appeals, the petitioners are not creditors of the

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[4]It was also urged below on behalf of the petitioners that the releases were obtained through "subtle duress" practiced by the Trustee, but this argument also was rejected at all stages of the proceedings below (Special Master, R. 751; Circuit Court of Appeals, R. 785).

Debtor at all, and this quite regardless of what significance is attached to the provisions for landlords' claims in Section 77B. Thus, although the petition speaks in terms of important questions of statutory construction, what the petitioners are really asking is that this Court rewrite their contracts. Such relief is, of course, not within the province of any Court to grant.

The petition itself, aside from stressing the fact that the case involves "a great group of landlords' claims" offers only two reasons why a writ should be granted. Both would involve interpretation of the provision in Section 77B relating to landlords' claims; but in our view neither is raised by this case.

(1) The petition urges first that the court below failed to give effect to the alternative character of the statutory provision. The argument is that in limiting a landlord to "a claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim" (R. 787); the decision below overlooked the alternative claim provided by the statute "for injury resulting from the rejection of an unexpired lease".

The question, therefore, which this Court is asked to pass upon is whether the rejection of a lease *without more* constitutes the basis of a claim under the statute.

But this question is not presented by any of the petitioners' claims. It might have been, in the 38 cases where the leases were in fact rejected by the Debtor's trustee in bankruptcy, if such leases had not been subsequently terminated and claims thereunder released. But what their claims *would have been* if these 38 landlords had stood on their rights and held the Debtor to its obligations is now a matter of no moment. They, like the other 56 landlords in

this case whose leases were never rejected (R. 700), expressly released the Debtor, and all but 2 of them at the same time agreed to the surrender or cancellation of their leases.[5]

(2) The second point urged in the petition is that Congress, in measuring the landlord's three-year claim from the "date of surrender *of the premises* to the landlord or the date of reentry of the landlord", intended landlords' claims to survive surrender *of the leasehold estate.* But this question is likewise not presented by any of the petitioners' claims. Each of the 50 landlords who accepted a surrender in this case also gave a release of any claims which he might have against the Debtor; and these releases are broad enough to include any claims arising from such rejection.

As stated in the opinion below (R. 787):

> "The issue here is not one of the provability of actual claims for future rent, but rather one of recognition that the claimants have no claims at all against the debtor or its estate."

We do not say that under no circumstances would the rejection of a lease give rise to legal injury and consequently to a claim under statute. In the instant case, however, no legal injury was sustained, and even if any claims therefor ever arose these claims have been released.

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[5]These two executed releases to the Debtor for a cash consideration.

II.

THE QUESTION OF THE PROPER CONSTRUCTION OF THE 9 QUALIFIED RELEASE CONTRACTS, WHICH WAS DECIDED ADVERSELY TO THE PETITIONERS BELOW, DOES NOT CALL FOR A REVIEW BY THIS COURT.

As to 9 of the 94 claims here involved, there was a qualification of the effect of the agreements executed by the landlords whereby the leases were surrendered and the Debtor was released from further liability. The qualification took the form of a rider negativing the waiver by the landlord

> "of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled * * *." (R. 784)

It was argued below for these 9 landlords that the effect of the rider was not only to preserve whatever claims the landlord could prove under the bankruptcy law as it then (in 1932) stood[6], but also to obtain for the landlord the advantage of any change in the bankruptcy law which Congress might make in the future. A majority of the court below held, however, that in the light of the surrounding circumstances this was not "the natural and reasonable meaning of the language used" (R. 805).[7]

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[6]At the time the releases were given this Court had not yet decided *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, holding the future rent claims non-provable under Section 63a of the Bankrupcty Act prior to its amendment in 1934.

[7]The correctness of the interpretation put upon the petitioners' contracts by the majority of the court below is perhaps indicated by the fact that although similar qualified releases of the Debtor were executed by over 165 of its former landlords, only 50, including the 9 here involved, have sought to file claims in these proceedings.

As the petition concedes, questions as to the proper construction of a contract provision are not grounds for granting certiorari. Nor, we submit, should this salutary rule be changed by the mere fact that the terms of the contract to be construed relate to various aspects of federal procedure,—"bankrupt estate", "provable claims", "the Bankruptcy Court". The governing question is still, as in all contract cases, what was the intent of the parties; and it was on this question that the Court below divided. Indeed, on this aspect of the case the only evidence in the record consists of, and all of the arguments made below for the petitioners were based upon, the negotiations by and between the bankruptcy trustee and its attorneys, the Debtor and its attorneys, and the petitioners and their respective attorneys and representatives, leading up to the execution of the agreements in question.

CONCLUSION

The petition for a writ of certiorari should be denied, with costs.

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as Trustee.

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